

UNITED STATES BANKRUPTCY COURT  
SOUTHERN DISTRICT OF NEW YORK

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In the Matter

of

Index No.

08-01789

THE SIPA LINK,

Debtors.

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February 24, 2009

United States Custom House

One Bowling Green

New York, New York 10004

Motion for Order Pursuant to Section 78eee(b)(5)  
of SIPA, Sections 105, 330 and 331 of the Bankruptcy Code,  
Bankruptcy Rule 2016(a) and Local Bankruptcy Rule 2016-1  
Establishing Procedures Governing Interim Monthly  
Compensation of Trustee and Banker & Hostetler LLP, et al

B E F O R E:

HON. BURTON R. LIFLAND,

U.S. Bankruptcy Judge

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PROCEEDINGS

THE COURT: The SIPA Link.

MR. SHEEHAN: Good morning, David Sheehan, representing the trustee, Irving Picard. Mr. Picard is here in the courtroom with me.

Your Honor, we have a number of things on the agenda this morning. What I would propose with Your Honor's blessings is the order we take them in, if that is okay with you, we have a motion.

THE COURT: I am very yielding. Go ahead. As long as you could be efficient in the way you place it.

MR. SHEEHAN: Thank you, Your Honor. The first thing I would like to raise is the motion that is unopposed and, in fact, Mr. Bell is here from SIPC and they do not oppose the application for the order for monthly expenditures. I believe Your Honor is probably familiar with it, so I won't go through the details of it here.

What it recognizes, Your Honor, is that in this particular instance as opposed to the normal course where you would come in for interim compensation on a

1 monthly or quarterly, I should say, or a six-month basis,  
2 given the size and nature of this proceeding SIPC has  
3 recognized, as they have in the Lehman case, that there  
4 should be monthly payment which will take place and then,  
5 obviously, it will ultimately be submitted to your Honor on  
6 a regular basis for your review and approval. And, as I  
7 say, SIPC does not oppose it and I move for the entry of  
8 that order, Your Honor.

9 THE COURT: Ultimately the funding comes  
10 out of the pocket of SIPC; correct?

11 MR. SHEEHAN: Yes, Your Honor.

12 THE COURT: It is not an ordinary Chapter  
13 11 where I would be concerned that the estate would be  
14 diminished.

15 MR. SHEEHAN: There is not going to be any  
16 general estate. This is a no-asset case, and in this  
17 instance it will be paid by the SIPC corporation.

18 THE COURT: Does anyone want to be heard?  
19 Hearing no response, the application is  
20 granted.

21 MR. SHEEHAN: Thank you, Your Honor.

22 THE COURT: Submit an order.

23 MR. SHEEHAN: I will submit an order, Your  
24 Honor. In fact, I do have it, but there is one change I  
25 want to do and I realized it this morning and I will submit

1 it to your Honor later.

2 THE COURT: I will be here.

3 MR. SHEEHAN: Thank you, Your Honor.

4 The other motions that are before Your  
5 Honor, the first one that I would suggest we would address  
6 is the one dealing with -- well, there are three motions  
7 addressed to car leases where there is relief being sought  
8 -- it is not my application we are resisting it, but in any  
9 event it is an application for relief from the automatic  
10 stay.

11 MR. MOONEY: Your Honor, Martin Mooney  
12 appearing for the law firm of Deily Mooney & Glastetter,  
13 LLP, as counsel for DCFS, USA.

14 We actually have the next three motions,  
15 each of them very similar. They all involve leased  
16 vehicles and the leased vehicles have been surrendered.  
17 We filed the motion --

18 THE COURT: When?

19 MR. MOONEY: I believe they were  
20 surrendered in December. We filed a motion for relief  
21 from the automatic stay pursuant to Section 362, but also  
22 for relief from Your Honor's prior order dated January 5.  
23 We alleged our ownership in the vehicle, surrender of the  
24 vehicle and whatever contractual payment default may have  
25 existed.

1 But we expected that we would obtain our  
2 order because there seems to be no opposition. After  
3 filing the motion we were advised by counsel to the Trustee  
4 that our motions were moot because the Section 365(a) order  
5 had been entered rejecting the leases and the opposition  
6 that was filed also asserts that we were not responsive  
7 and, therefore, attorneys' fees should be awarded against  
8 us to the Trustee on these three motions.

9 Your Honor, I don't necessarily consider it  
10 clear whether or not the rejection of the lease in a  
11 Chapter 11 may terminate the automatic stay. It might be  
12 clearer in a Chapter 7 under Section 365(d), but, Your  
13 Honor, honestly I felt in this case it was not a Chapter 7,  
14 it wasn't a Section 365(d) order. And, in fact, the case  
15 law cited by the Trustee also indicates, Judge, that this  
16 is Second Circuit law to suggest that if there is a  
17 specific order it is going to control over a general order  
18 when there is a question whether or not rejection of lease  
19 terminates the automatic stay. That is the Stoltz case  
20 that was mentioned by counsel to the Trustee.

21 Our position, Your Honor, is that your  
22 specific order is that specific and, in fact, that is why  
23 our motion needs relief from not only Section 362 but your  
24 specific order because the order dated January 5 mentions  
25 Section 362 but then in a separate decretal paragraph you

1 indicate that it stays all creditors until there has been a  
2 further order of the Court.

3 THE COURT: You are here an awful lot in  
4 connection with the lift stay motions for automobiles.

5 MR. MOONEY: Yes, Judge.

6 THE COURT: And you either have someone  
7 employed by your firm or a stringer.

8 MR. MOONEY: Yes, Judge.

9 THE COURT: A nice young person comes in --

10 MR. MOONEY: Yes.

11 THE COURT: -- who recognizes the  
12 realities of informally resolving these matters.

13 MR. MOONEY: Yes, absolutely.

14 THE COURT: I looked at the papers here and  
15 I have looked at the telephone tag that has been asserted  
16 in all these papers, and I just wonder if this isn't too  
17 much like a couple of teenagers trying to get ahold of each  
18 other and ducking each other because they don't want to  
19 bite the bullet or they have a particular strategy. This  
20 is you will admit just like any of the other ones that  
21 you've brought before me.

22 MR. MOONEY: Absolutely.

23 THE COURT: The only thing I usually ask  
24 when a young lady is here is what color is the vehicle.

25 In this instance, I don't care.



1 MR. MOONEY: Judge, I have traveled from  
2 Albany. I honestly don't know.

3 THE COURT: I know you don't.

4 MR. MOONEY: We submitted stipulations.

5 THE COURT: Actually, I really think an  
6 intelligent return of a call or the pick up of a phone to  
7 the right people would have solved the problem.

8 MR. MOONEY: Judge, we indicate in our  
9 papers that they did return the phone calls.

10 THE COURT: I am not your adversary. I  
11 will let your adversary make the argument.

12 MR. MOONEY: Judge, we were absolutely  
13 willing to stipulate similarly to a relief from stay in  
14 your order. I just felt the order was needed because this  
15 is not an 11, it is not a 7.

16 THE COURT: But if I told you I called you  
17 at 4 o'clock and 5 o'clock and you didn't call back and the  
18 assistant didn't call back. The other side says we called  
19 back. Come on.

20 MR. MOONEY: Judge, I don't disagree, but  
21 we have been asking for the stipulation because we need the  
22 order and we just couldn't get that.

23 MR. SHEEHAN: Your Honor, we are mystified  
24 by this application. We read 365(b)(1), and if I may be  
25 so bold to read that into the record.

1 THE COURT: If I may be so bold to say that  
2 this similarly could be done with a stipulation.

3 MR. SHEEHAN: Why is the stipulation  
4 necessary? Why do we have to go through this? This is  
5 absurd.

6 THE COURT: So he has some comfort that  
7 someone doesn't come along having tried to purchase a car  
8 that doesn't have a title. Why don't you give him a  
9 stipulation.

10 MR. SHEEHAN: Fine, Your Honor. Thank  
11 you very much.

12 MR. MOONEY: Thank you, Your Honor.

13 THE COURT: I bet you don't know what color  
14 the car is; am I correct?

15 MR. MOONEY: You are correct.

16 MR. SHEEHAN: We do.

17 Your Honor, the next application we would  
18 like to address is the one brought on behalf of the  
19 Rosenman family. Actually, it is our motion, I apologize.  
20 It is our motion to dismiss the Rosenman complaint seeking  
21 the return of the \$10 million we deposited just on the eve  
22 of the Madoff bankruptcy. The motion will be argued by  
23 Seanna Brown from Baker Hostetler.

24 MS. BROWN: Hello, Your Honor. The basis  
25 for the trustee's motion in the Rosenman complaint is

1 simple, and the complaint must be dismissed. The Rosenmans  
2 allege that he deposited \$10 million in cash with the  
3 Debtor prior to the filing date.

4 The papers attached to the Rosenman  
5 complaint indicate that he received a confirmation  
6 displaying the account number of the Debtor, and the Debtor  
7 sold short \$10 million of treasury bills on his behalf.

8 Rosenman raised no objection to the receipt  
9 of this confirmation or the transaction reportedly  
10 conducted on its behalf prior to the filing date of this  
11 liquidation.

12 These facts clearly demonstrate Rosenman  
13 falls within the statutory definition of customer and that  
14 his funds are customer property.

15 Rosenman argued that SIPA was not intending  
16 to provide customers with a windfall and that all customers  
17 will be treated equally whether they deposit their money on  
18 the first day or the last day and that no customer should  
19 be receiving them at the expense of other customers.

20 And try as they might, on the filing date  
21 the door closed on the filing. Rosenman deposited cash  
22 with the Debtor for the purpose of purchasing security, and  
23 his claim must be considered within the parameters of the  
24 statutory scheme of SIPA which, Your Honor, Rosenman has no  
25 more or no less a first out exception. Rosenman's attempt

1 to contravene the statutory scheme created by Congress  
2 should be rejected and the trustee submits that his  
3 complaint should be dismissed.

4 MR. KLEINHENDLER: Good morning, Your  
5 Honor. Howard Kleinhendler from the law firm of Wachtel &  
6 Masyr for the Rosenman Family, LLC.

7 What you just heard, Your Honor, is a  
8 recitation of fact and the issue before you on this motion,  
9 which is a 12(b)(6)motion, the complaint is under a  
10 favorable -- it's withdrawing every inference in favor of  
11 the plaintiff, and it provides a cognizable value form of  
12 relief.

13 Now what you heard and what you saw at  
14 least in their opening papers before they changed it in  
15 their reply papers, which is the threshold finding that you  
16 must make is that we are a customer, and that we gave money  
17 for the purchase of securities. Our complaint says that  
18 is not true. We gave the guy \$10 million to hold, the  
19 fund was closed. He had no authority to use the money.  
20 We did not expect any return on the money and at this stage  
21 of the proceedings --

22 THE COURT: There were documents attached  
23 to the claim.

24 MR. KLEINHENDLER: There was documentation.

25 THE COURT: Where in the documentation did

1 this say the monies were to be held? Where in the  
2 documentation did it say this is a conditional transfer or  
3 that it is for escrow purposes? I looked very hard.

4 MR. KLEINHENDLER: It doesn't say that in  
5 the documentation, but it does not say what they say in the  
6 documentation. If you look at the documentation, what do  
7 you have?

8 You have a fax transmission from a Ms.  
9 Krupey (phonetic), who works for Madoff, that says here is  
10 where you should wire the fund. It does not say wire the  
11 fund in order to be invested. It doesn't say wire the  
12 fund in order to use it. There are no documents attached  
13 as to opening up accounts. That is number 1.

14 The second document is a wire transfer and  
15 the third document is a confirmation which we clearly  
16 allege in the complaint was never authorized and was not  
17 true.

18 So if you look at the facts in the  
19 complaint and the documents, at this point of the case,  
20 Your Honor, you could not draw the conclusions they are  
21 asking you to draw when what we are telling you is d  
22 diametrically opposed and there was a conversation between  
23 Rosenman and Madoff. Rosenman will get on the stand and  
24 tell you about the conversation. I don't have to prove my  
25 case only with documentary evidence, especially if there is

1 no documentary evidence to the contrary. That is a  
2 summary judgment type of analysis. That is not a 12(b)(6)  
3 analysis. This is a 12(b)(6)motion and at this stage,  
4 Judge, we are entitled to tell our story.

5 The complaint does not state the facts that  
6 they want you to believe. So let's look at the law.  
7 They don't have the facts and let's look at the law they  
8 are arguing. First they say SIPA applies because of the  
9 word "customer." They admit in order to be a customer we  
10 have to provide money for the purchase of securities. We  
11 say that never happened. That is a fact issue, the way  
12 you posed it already, it is a he said, she said issue.  
13 You can't decide that on the 12(b)(6). If it is not  
14 customer property, Judge, this is a regular bankruptcy  
15 case, the Rule 541 applies. We cited 11 circuit law on  
16 point that 541 applies in a SIPA liquidation. The trustee  
17 did not come back with any law to contradict that.

18 There are cases, and even in a SIPC case  
19 where the Court undertakes the traditional, the standard,  
20 the everyday analysis of what is the property of the  
21 estate.

22 If I give someone money to hold and he  
23 takes it in order to steal it, Your Honor, he has no title.  
24 We cited the Newpower (phonetic) case, a Sixth Circuit case  
25 that is directly on point with facts very similar. In

1 that instance the investors gave money to a person to  
2 invest in real estate.

3 The person got money from the investor, but  
4 instead of putting it into real estate, he bought some cars  
5 and took his girlfriend out, et cetera. The Sixth Circuit  
6 went through almost every argument you saw in their reply  
7 papers and rejected it.

8 Number 1, when someone takes your money  
9 through a false pretence and embezzles it and he does not  
10 have a gainful legal title, it is not a fraud. That is a  
11 criminal theft.

12 Judge, we have the same law in New York.  
13 The New York penal code Section 155.05 is the larceny  
14 statute. That is the theft statute in this state, just  
15 like in Michigan. It says that a person who steals  
16 property whether he breaks and enters into someone's home  
17 and pulls money out of the safe deposit box or a safe, or  
18 he takes the money through larceny by trick or embezzlement  
19 that is a theft. Judge, embezzlement defined by the New  
20 York Court of Appeals --

21 THE COURT: There are a lot of people  
22 sitting here that would take that position, I suppose.

23 MR. KLEINHENDLER: We'll get to that and  
24 also the other people sitting here -- that is another  
25 argument because we are sitting here and the other people

1 who are sitting here don't have my case and here is why.

2 Number 1, the other folks who are sitting  
3 here -- and I have been talking to other people and, of  
4 course, the trustee knows more about the case than me, but  
5 again we are at 12(b)(6) and I don't see any other  
6 adversary cases filed with the Rosenmans where the money  
7 was given to be held, where they would have another meeting  
8 in January to talk about the fund, where there was no  
9 authority to purchase securities.

10 Every other case in this Court, Your Honor,  
11 is from people who signed opening agreements who sent their  
12 money to Madoff for the purpose of investing it in  
13 securities for them to return the so-called 12 percent a  
14 year return that Madoff was promising people. That is the  
15 difference.

16 Those folks are customers. Madoff  
17 arguably had legal title on that money. That is not  
18 Rosenman's case. That is distinguishing factor number 1.

19 Distinguishing factor number 2, Judge, is  
20 traceability. Rosenman is out of court unless they could  
21 point to the fund in the Chase account. We know there is  
22 233 million now. We need to take a look at the Chase  
23 record. We are not talking about a lot of Chase records,  
24 we went from December 1 to December 12. It is possible on  
25 December 1, there was zero in Chase or very close to zero



1 and then at the end of the day a lot of money was deposited  
2 after that. Therefore, people can't trace their funds.

3 This is a case that is unique, Judge, and  
4 it is distinguishable from a lot of cases that the Trustee  
5 has brought because this is a case where the funds were  
6 still in the possession of the thief. The funds went into  
7 Chase on the 5th. They stayed in Chase. This is not a  
8 case where funds went into Chase and then went someplace  
9 else, in and out, which raises a whole host of issues.  
10 Very few people have this tracing argument. So contrary  
11 to what the Trustee is trying to convince you, if you let  
12 this case go forward you are opening a Pandora's box.

13 I say to you that is not true because of  
14 the two reasons I just articulated and certainly, Judge, at  
15 this 12(b)(6), a 12 (b)(6) status indicates you can't reach  
16 the conclusion yet. There is no evidentiary showing yet.  
17 There has been a lot of press, there has been a lot of talk  
18 and press conferences, sure, but you don't have a record  
19 yet to make that equitable type of decision.

20 Let me just make this very important point.  
21 Rosenman is not seeking equity from you. The case law is  
22 clear that when a thief steals the money and he still has  
23 it, the 541 action is like a turnover type of action and it  
24 is recoverable as a matter of law. I am not coming to you  
25 under a constructive trust equitable theory. I am coming

1 here for justice at law. So these wholly equitable  
2 arguments, Your Honor, don't even surface yet.

3 Therefore, Your Honor, at this 12(b)(6)  
4 motion stage, you don't have enough to throw out my case.  
5 Rosenman is entitled to his day in Court. They could take  
6 his deposition. They could put on whatever witness they  
7 want, and find whatever document they want to find to try  
8 to support the facts that you just heard recited, but those  
9 facts are in favor of my client and the rules don't let you  
10 draw inferences in their favor. You have to draw  
11 inferences in my favor and, therefore, the motion should be  
12 denied.

13 THE COURT: Thank you.

14 MS. BROWN: Your Honor, my first response  
15 to Mr. Kleinhendler is that the facts are in the complaint.  
16 It clearly states he had deposited with the Debtor prior to  
17 the filing date. He received a confirmation that the  
18 securities were purchased on his behalf, and he had no  
19 objection until the liquidation proceeding commenced.

20 Those funds were commingled in the Debtor's  
21 Chase account with other customer property, and the statute  
22 here governs how that customer property could be  
23 distributed.

24 The argument that the thief has no title  
25 and, therefore, here the Debtor had no title to Mr.

1 Rosenman's funds, if that argument were required that would  
2 mean that none of the debt assets held by Debtor would  
3 constitute customer property in this case which I submit  
4 would not be a very logical conclusion.

5 Finally, I would like to say the argument  
6 with regard to tracing, that seems to take advantage of  
7 having the fortuity of being one of the last people to  
8 invest with the Debtor. There are many people investing  
9 in the course of many years and certain of them can trust  
10 the fund but those people are in the same position as Mr.  
11 Rosenman, and he would not be entitled to seek the return  
12 of his fund merely because he deposited them close to the  
13 filing date of this liquidation.

14 THE COURT: Anything further?

15 MR. KLEINHENDLER: Judge, think I forgot to  
16 deal with one issue that counsel raised again. This motion  
17 which we didn't object to -- we got this confirmation on  
18 the 8th and 9th and before anyone had an opportunity to  
19 even understand and before Rosenman had an opportunity to  
20 seek counsel, this man was arrested.

21 So you could not make an inference at the  
22 12(b)(6) stage to say just because there is no objection  
23 pleaded that it should overrule the fact that Rosenman  
24 stated emphatically in the complaint that the transaction  
25 was not authorized.

1 That is right in the complaint, it was not  
2 authorized. I don't see how you get to this side of the  
3 fact by saying specifically he didn't object. It says  
4 specifically the trade was not authorized. That is the  
5 only point I would like to make.

6 MS. BROWN: I would like to respond, Your  
7 Honor.

8 As to the whether or not the trade was  
9 authorized that goes to whether or not Rosenman has a claim  
10 for cash or securities under SIPA. It doesn't mean he is  
11 not a customer under the statute.

12 MR. SHARMA: Hemant Sharma on behalf of  
13 SIPC.

14 Relying on 4541 of the Code, in this case  
15 the Debtor had clear title to the fund in the bank account  
16 because they were the funds which bank account represents.

17 THE COURT: Well, much of the focus here is  
18 on whether or not the Rosenmans were customers. I think  
19 the focus should be on the funds in the bank account, those  
20 were clearly subject to the Debtor's control or the  
21 estate's control.

22 It appears that the principal purpose of  
23 the deposit was for purchase of securities and the timing  
24 is not all that relevant. The purpose is, and you do have  
25 the statute, that is very, very clear with respect to that

1 and there is case law that supports that. The timing  
2 issue is the sad part of this but, you know what, there are  
3 a lot of sad people out here and the timing difference here  
4 should not really make a difference.

5 Yes, I have sympathy for all those who were  
6 victimized, and Mr. Rosenman certainly cannot feel good to  
7 be the last one to have been ripped off or one of the  
8 last ones, but it also amazes me and I am not making a  
9 philosophical comment in certain circles apparently there  
10 is no real need to document anything.

11 \$10 million will be going one way or the  
12 other. If it was my \$10 million, I would make darn sure  
13 there was a paper trail of the conditions that it was being  
14 utilized under, the purpose, everything. If it was being  
15 escrowed, as you seem to be intimating that it should be  
16 held until January 1, when Mr. Madoff -- Mr. Madoff is the  
17 one who is making the election as to when that money should  
18 have been taken in. Mr. Madoff made the election to take  
19 it in just before the feces hit the fan. But it is clear  
20 to me that this is a customer deposit.

21 I really want to applaud both sides. I  
22 think your briefing was excellent and you have given me a  
23 lot to think about and it messed up my weekend. But I am  
24 going to grant the Trustee's motion to dismiss the  
25 complaint, and I will issue a decision this afternoon.

1 MR. SHEEHAN: Your Honor, I realize that  
2 my adversary in the other matter that was before Your Honor  
3 that we moved on was Hadleigh, and in that he moved, he  
4 didn't respond. What he did was amend the complaint and  
5 added what he alleged to be --

6 THE COURT: He is having a happy day he  
7 will win 50 percent of his argument.

8 MR. SHEEHAN: I would respectfully request  
9 in considering the Hadleigh motion, he has not added that  
10 and to suggest it is a --

11 THE COURT: My point is he may have not  
12 have added anything, and I may be hinting to the trustee as  
13 to what the trustee was facing, you don't want to make  
14 another motion all over again because there is a new issue  
15 thrown on the table, and whether that issue is one that  
16 sets a legal defense is questionable. But in your response  
17 you make a wonderbus argument it is not I a legal defense  
18 without pointing out how and why it is not a legal defense.  
19 So he is entitled to hear from you as to why that new issue  
20 is not viable.

21 MR. SHEEHAN: Thank you, Your Honor. We  
22 will move again. Thank you very much.

23 Your Honor, the last item is an  
24 application --

25 THE COURT: Do you have to work out the

1 timing? What is the statute for responding to the amended  
2 complaint?

3 MR. SHEEHAN: 20 days. I will talk to  
4 Mr. Kleinhendler and we will work something out, I'm sure,  
5 amicably with you with regard to that.

6 I believe the last item today on the  
7 calendar is the motion with regard to the application of  
8 502(h) for a SIPC proceeding, and it is not my application,  
9 it is indeed the application of Kramer Levin.

10 MR. BENTLEY: Good morning, Your Honor,  
11 Philip Bentley of Kramer Levin on behalf of the Lucerne  
12 Foundation and Collinwood Foundation in support of our  
13 motion for an order clarifying the claim filing deadlines.

14 Your Honor, I would like to introduce my  
15 partner from our litigation department, Mr. Kaufman. Mr.  
16 Kaufman will be arguing the motion this morning.

17 MR. KAUFMAN: Good morning, Your Honor.

18 THE COURT: Good morning or afternoon as  
19 you clearly said.

20 MR. KAUFMAN: Your Honor, this motion is  
21 one that we believe should be uncontroversial and, in fact,  
22 where we are a bit surprised that it has even been posed.  
23 There is no sound legal equitable or policy based reason to  
24 oppose it.

25 What we are seeking, Your Honor, is merely

1 to clarify one provision of the Court's December 23rd  
2 order, and, in particular, the one decretal paragraph that  
3 appears near the bottom of Page 7 of that order that says  
4 that the bar date for all claims is six months from the  
5 date of publication of notice and mailing.

6 Your Honor, although this motion is we  
7 believe uncontroversial it is a very important one, since  
8 it affects not only the three parties who are moving here  
9 but at least hundreds and possibly thousands of others who  
10 are in like position. These are --

11 THE COURT: You think Mr. Picard is going  
12 to sue thousands of people?

13 MR. KAUFMAN: It is hard to say how many  
14 people he will sue but he has made clear as late as the  
15 Friday's creditors meeting that he intends to bring  
16 avoidance suits. He has not made clear exactly what  
17 avoidance suits he is going to bring or against whom, but  
18 there is no doubt he is bringing them. He is certainly  
19 going to bring suits for those two redeemed investments  
20 within the last 90 days before the filing, and it is quite  
21 likely, and I think I venture to say it is a certainty he  
22 is going to sue those two redeemed investments within the  
23 last six years on fraudulent conveyance theories.

24 These investors who redeemed investments  
25 and who received more in cash than they invested are



1 investors who do not now have any claims, as the term  
2 "claim" is defined in the Bankruptcy Code, in 1015(a).

3 THE COURT: Do each of your clients fit  
4 that particular profile?

5 MR. KAUFMAN: They do.

6 THE COURT: They fit that particular  
7 profile?

8 MR. KAUFMAN: Yes.

9 THE COURT: They put out more than they  
10 invested?

11 MR. KAUFMAN: That is correct, Your Honor.

12 THE COURT: Are you speaking for everyone  
13 with that profile?

14 MR. KAUFMAN: Excuse me, Your Honor?

15 THE COURT: Are you speaking for everyone  
16 with that profile?

17 MR. KAUFMAN: We can't purport to speak for  
18 everyone. We made a motion on behalf of three clients who  
19 do fit that profile.

20 All I am suggesting to the Court is that in  
21 reality this application affects not only just the three  
22 parties we are representing here, but clearly a lot more.  
23 How many there are, we don't know. I am not even sure the  
24 trustee knows.

25 But I would venture to say given the number

1 of direct investors we do know about, I think there are  
2 some 8,000. There are at least hundreds and possibly  
3 thousands who redeemed more than they invested over the  
4 years. After all, it is probably the reason why the Ponzi  
5 scheme was able to go on as long as it did.

6 Your Honor, these investors don't have  
7 claims to file now. At most what they have are what are  
8 referred to in the bankruptcy world as springing claims.  
9 They are claims that will only come into being if avoidance  
10 suits are brought and are successful, and these investors  
11 have to give their money back to the estate.

12 At that time, Your Honor, they will then  
13 have a right to share in the SIPC fund and in a  
14 proportional share of the customer property to which they  
15 will have contributed.

16 Because they don't now have claims to file,  
17 Your Honor, we believe that the order that was entered on  
18 December 3, doesn't make clear what Section 502(h) of the  
19 Bankruptcy Code does and we are arguing, Your Honor, that  
20 502(h) is clearly applicable in a SIPC proceeding.

21 We say that because SIPA itself says that  
22 the Bankruptcy Code applies to the extent it is not  
23 inconsistent with SIPA or it actually says to the extent  
24 consistent with it then it applies. We say it is fully  
25 consistent with SIPA.

1                   There is significant prejudice, Your Honor.

2                   THE COURT: You say it applies. If it  
3                   applies, then file a claim.

4                   MR. KAUFMAN: Your Honor, if 502(h)  
5                   applies, we don't have to file.

6                   THE COURT: What you are really looking at  
7                   is a determination that 502(h) will apply in a particular  
8                   case.

9                   MR. KAUFMAN: We are asking at the bottom,  
10                  Your Honor, to determine that 502(h) does apply in the SIPA  
11                  proceeding.

12                  THE COURT: Do you want an advisory opinion?

13                  MR. KAUFMAN: We don't want an advisory  
14                  opinion.

15                  THE COURT: It sounds like that to me.

16                  MR. KAUFMAN: Your Honor, these investors  
17                  are affected directly at this moment by the current order,  
18                  by the ambiguity in the current order. They have to  
19                  determine whether to file purely protective --

20                  THE COURT: I am curious. You raised an  
21                  ambiguity in the previous papers and then the ambiguity  
22                  issue went away clearly because the ambiguity arises when  
23                  you have a short bar date based upon the loss of specific  
24                  securities, you are not seeking that. You are seeking  
25                  something else, and that bar date would be back in July.

1 You have plenty of time.

2 MR. KAUFMAN: Your Honor --

3 THE COURT: You are not seeking recovery of  
4 securities?

5 MR. KAUFMAN: That is correct, we are not.

6 THE COURT: So the March date doesn't  
7 apply, which you had raised that as some confusion.

8 MR. KAUFMAN: Your Honor, until Mr. Picard  
9 made clear that he was not going to treat those who filed  
10 claims between March 4 and July 2 any differently than  
11 those who filed by March 4, that was not clear. It now is  
12 clear.

13 But fact it is July 2 as opposed to March 4  
14 doesn't make the issue late ripe. That day will come soon  
15 enough and we are here. There is an existing order of the  
16 Court that these investors need to deal with and the order  
17 purports to say that all claims have to be filed by a  
18 certain date or else they are barred.

19 Our argument is simply under 502(h), Your  
20 Honor, what we have are not claims. They are simply not  
21 claims, because not all of the elements necessary to create  
22 a legal obligation exists even to this day. Your Honor,  
23 the case that we cite in Manville acknowledged that  
24 proposition, and the Second Circuit has acknowledged that  
25 proposition.

1 We don't have claims and we are not  
2 affected by this requirement to file by a deadline.  
3 However, if we filed purely protective claims we will  
4 likely have waived a right to a jury in the subsequent  
5 avoidance actions that the Trustee will commence.

6 THE COURT: I think the Hooker case in the  
7 Second Circuit is instructive about that.

8 MR. KAUFMAN: The Hooker case was  
9 overruled.

10 THE COURT: I don't necessarily agree with  
11 that.

12 MR. KAUFMAN: We believe that the Hooker  
13 case was decided before rule 3002(c)(3) was amended and had  
14 the amendments been in effect then, Your Honor, Hooker  
15 could not have been decided the way it was.

16 THE COURT: That is another issue that I  
17 won't go over into. A rule only amplifies a statute and  
18 the argument against you, the six months' statute is very  
19 clear.

20 MR. KAUFMAN: We don't believe it is very  
21 clear, Your Honor. We believe SIPA does not explicitly  
22 define a term claim as the Bankruptcy Code does.

23 THE COURT: You may be right, there may come  
24 a time that you file a 502 claim.

25 Have you gotten anything else, counsel?

1 MR. KAUFMAN: No, Your Honor.

2 MR. SHEEHAN: Your Honor, I will be very  
3 brief.

4 THE COURT: You don't have to be.

5 MR. SHEEHAN: Well, I this we actually  
6 laid out our argument pretty well in the papers. The only  
7 thing I would like to say is this, the colloquy that Your  
8 Honor just had informs why this is an advisory opinion and  
9 why we should not be delving into it at this juncture.  
10 Your Honor certainly understands the concept of March 4 and  
11 the return of the securities, the statute is very clear.

12 THE COURT: Counsel says that is no longer  
13 an issue, we are only talking about the July date.

14 MR. SHEEHAN: The reason it is important  
15 is this, the reason it became a nonevent is because of the  
16 facts involved. In other words, we know now there were no  
17 securities. We now know that. So, therefore, March 4,  
18 if we had known that at the beginning, we probably wouldn't  
19 have March 4 in there because there was never going to be a  
20 return of the securities and that we could not do it in the  
21 order we wanted.

22 What does that tell us? We should not deal  
23 with this claim in a vacuum. We should wait until we have  
24 all the facts and associated with that and at that time if  
25 they could convince Your Honor that this claim applies in

1 the SIPA proceeding based upon the facts before you, that  
2 is when it should be dealt with.

3 For all we know they have no claims. If  
4 all they have is false profits and once we get that back, I  
5 will submit to you they are entitled to no claim under  
6 those circumstances.

7 We can't do this in today as a claim,  
8 without knowing the history of the account, who is  
9 involved, what money they put in, all of other things  
10 associated with that and it would be an extraordinary  
11 advisory opinion, since the statute is clear, six months  
12 from the date of mailing, no controversy, and it is only if  
13 it is inconsistent with the statute does it incorporate the  
14 other provisions. I would suggest to your Honor on the  
15 face it is inconsistent.

16 MR. KAUFMAN: May I respond briefly?

17 THE COURT: You might as well wait and see.

18 MR. GLUCK: Matt Gluck, from the law firm  
19 of Milberg LLP. Hopefully, this will be the first of many  
20 occasions where we could agree with the trustee. I  
21 certainly hope so. Of course, this is seeking an advisory  
22 opinion. It is something that easily could be dealt with  
23 much later in the sense that Your Honor's phrase "many sad  
24 people" keeps ringing in my ears. And in Manville which I  
25 barely remember because if there was ever a case where it

1 is certainly important not to just have shows, private  
2 agendas and where there is a great temptation to have it,  
3 this is one.

4 For the many sad people it is important  
5 that -- well, we all know where an awful lot of this money  
6 ended up, but there is still a lot more to be found and it  
7 is very important to concentrate on that and to concentrate  
8 on getting people their money back as soon as possible. I  
9 am sure the trustee would be focusing on that, I would hope  
10 that everyone with an interest would be helping in that and  
11 we try to make it fast to get down to the really important  
12 things because people's lives, not just money that is at  
13 stake.

14 As far as advisory opinions, and it is  
15 indeed at least from the last Friday meetings there were  
16 some serious issues that claimants, customers, and  
17 creditors will have to resolve, hopefully amicably, and if  
18 not we will give Your Honor some real stuff to sink your  
19 teeth into.

20 Those are the real things that have to be  
21 done and advisory opinions are things that should be  
22 waiting so we could get to the main agenda here.

23 MR. SHARMA: Your Honor, Hemant Sharma on  
24 behalf of SIPC.

25 I have nothing to add to what these two



1 just said, and what Mr. Sheehan has told you.

2 MR. KAUFMAN: I would like to address a  
3 little bit further the return of money that this is  
4 requesting and the advisory opinion.

5 As we point out in the brief, a claim is  
6 ripe for review when this is a real and substantive threat  
7 that the proof of an injustice would occur, and one does  
8 not have to wait for the consummation of the threatened  
9 injury to obtain preventable relief.

10 What is suggested here is that if our  
11 clients are sued and have to return money, they could then  
12 petition the Court for a decision as to whether 502(h)  
13 applies.

14 Your Honor, we would submit that is too  
15 late. That is after the injury has occurred because the  
16 injury, Your Honor, is by not knowing whether or not 502(h)  
17 will apply now because with the bar date of July 2 coming  
18 up, our clients are in the position of not having claims to  
19 file, but facing the likelihood that they will be the  
20 subject of avoidance actions and the possibility of having  
21 to put money back into the estate.

22 I will give you an example, Your Honor, how  
23 the injury is very real. If you and I, Your Honor, had  
24 been foolish enough to have invested each \$1 million with  
25 Madoff a few years ago and this past November for personal

1 reasons, Your Honor --

2 THE COURT: Why don't you use a far lesser  
3 number that is more realistic unless you can get through to  
4 Congress.

5 MR. KAUFMAN: I will use it as a round  
6 number. It is unrealistic money but that is the kind of  
7 money that people invested in Madoff, that's what they put  
8 in. For round numbers, let say, if we both invested \$1  
9 million years ago and last November for personal reasons,  
10 Your Honor, you wanted to clean out your Madoff account and  
11 you were fortunate enough to have what purported to be \$2  
12 million in that account and so you pulled out \$2 million  
13 within the 90 days before the bankruptcy, and I left my  
14 money in --

15 THE COURT: I mean there is also the tax  
16 consequence.

17 MR. KAUFMAN: Your Honor, clearly having  
18 left my money in, I lost \$1 million.

19 THE COURT: Whether there is a tax  
20 consequence or not is a strategic determination and they  
21 have to be made on an individual basis.

22 MR. KAUFMAN: This is not a strategic  
23 decision.

24 THE COURT: It is part of the formula in  
25 making a determination as to whether someone wants to file

1 A claim or not.

2 MR. KAUFMAN: 502(h) does not require that  
3 to be made, that determination to be made because it is  
4 recognized implicitly there is a right to a jury in an  
5 avoidance suit. That is the reason why springing claims  
6 need not file proofs of claims under the Bankruptcy Code.  
7 That is the reason.

8 That is what I am saying in the example I  
9 gave you, Your Honor, with your having pulled out \$2  
10 million and I left my money in, I clearly have a proof of  
11 claim to file by July 2 for \$1 million. That is my loss.

12 You are not going to be sued in a  
13 preference action by the trustee and have to give back the  
14 \$2 million you took out. So not only have you lost 1  
15 million, you lost \$2 million but you didn't file a  
16 protective claim before the July 2 bar date. You have to  
17 contribute into the pot \$2 million that you get to share in  
18 and you get zero.

19 If you did file a protective claim, Your  
20 Honor, you would have waived your right to a jury in the  
21 avoidance suit that the Trustee brought against you. That  
22 is why 502(h) applies not only in a bankruptcy, but in a  
23 SIPA proceeding too.

24 We recognize, Your Honor, and I am not  
25 crystal clear about that, but we submit there are

1 provisions that make it so including the production that  
2 says that the Bankruptcy Rule, Bankruptcy Code and rules  
3 apply to the extent it is consistent. And also there is  
4 another provision, Your Honor, that deals with the  
5 avoidance actions in SIPA, Section 78fff(2)(C), entitled  
6 "Recovery Of Transfers."

7 That says whenever customer property is not  
8 sufficient to pay in full, the claims set forth in sub  
9 paragraphs A through D of paragraph 1, Trustee may recover  
10 any property transferred by the Debtor and which except for  
11 such transfer would have been customer property if and to  
12 the extent such transfer is voidable or void under the  
13 provisions of Title 11 -- and this is the relevant  
14 language -- such recovered property shall be treated as  
15 customer property for the purpose of such recovery. The  
16 property so transferred shall be deemed to have been the  
17 property of the Debtor. And if such transfer was made to a  
18 customer or for his benefit, such customer shall be deemed  
19 to have been a creditor.

20 Your Honor, it is to have been a creditor.  
21 So he was not a creditor before, but he will be treated as  
22 if he was a creditor if he has to put back money.

23 We submit, Your Honor, that in combination  
24 with the other provisions of SIPA that it is clear that  
25 Section 502(h) applies in a SIPA proceeding and that those

1 with mere springing claims are not claimants who have to  
2 file by the bar date.

3 THE COURT: Does anyone else want to be  
4 heard?

5 MR. SHEEHAN: I have nothing further, Your  
6 Honor.

7 THE COURT: All right, thank you.

8 No matter how you slice it or dice it, you  
9 are asking for an advisory opinion. And again on this  
10 subject, as well as the preceding one, I appreciate the  
11 briefing on the part of all parties that helped crystallize  
12 the issue and made it easy for me to sit here and determine  
13 whether what I have already viewed as the appropriate  
14 determination should or should not be adhered to. So this  
15 afternoon I will or maybe this morning yet, I will issue an  
16 opinion.

17 Frankly, the opinion will have a few  
18 bullets in it and I will give you some of the big ones.

19 The movant here admits they do not  
20 currently have claims against the Debtor. They merely  
21 allege they have potential actions which may or may never  
22 be commenced. This court is not deciding whether Section  
23 502(a) to the Bankruptcy Code applies unless and until that  
24 issue opens and is brought by the party with standing to do  
25 so.

1                   So from what I have before me, this isn't  
2                   the right matter. You have plenty of time to consult and  
3                   decide whether you want to file a protective proof of  
4                   claim, and I am very well aware that a jury trial is one  
5                   aspect, tax consequences is another and for investors it  
6                   would be an individual's choice, maybe a Hobson's choice,  
7                   maybe not. But the filing or nonfiling of a claim is an  
8                   act of volition employed by individual parties, and is a  
9                   tactical decision.

10                   Here the movants have until July 2, 2009 to  
11                   evaluate their individual circumstances, and to determine  
12                   whether or not they want to file a protective proof of  
13                   claim. And on the up side, I reiterate I am not making a  
14                   determination here today as to whether 502(h) applies. The  
15                   trustee has not even asked me to do that. The moving  
16                   parties have. The motion is denied.

17                   MR. SHEEHAN: Thank you, Your Honor. I  
18                   will submit an order consistent with Your Honor's opinion.

19                   I think that concludes the calendar for  
20                   today.

21                   THE COURT: Fine.

22

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C E R T I F I C A T E

STATE OF NEW YORK            }  
  }       ss.:  
COUNTY OF NEW YORK        }

I, MINDY CORCORAN, a Shorthand Reporter  
and Notary Public within and for the State of New York, do  
hereby certify:

That I reported the proceedings in the  
within entitled matter, and that the within transcript is a  
true record of such proceedings.

I further certify that I am not related, by  
blood or marriage, to any of the parties in this matter and  
that I am in no way interested in the outcome of this  
matter.

IN WITNESS WHEREOF, I have hereunto set my  
hand this 24th day of February, 2009.

\_\_\_\_\_  
MINDY CORCORAN